91-883

Nos. 91-883 & 91-952

Supreme Court, U.S.
FILED
JAN 2 1 1992
OFFICE OF THE CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM, 1991

CHILDREN'S LEGAL FOUNDATION, INC. and
AMERICAN FAMILY ASSOCIATION, INC.,
Petitioners,

v.

ACTION FOR CHILDREN'S TELEVISION, *et al.*,
Respondents.

FEDERAL COMMUNICATIONS COMMISSION and
UNITED STATES OF AMERICA,
Petitioners,

v.

ACTION FOR CHILDREN'S TELEVISION, *et al.*,
Respondents.

On Petitions for a Writ of Certiorari to the United States Court of Appeals for the District of Columbia Circuit

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BRIEF FOR THE RESPONDENTS ACTION FOR CHILDREN'S TELEVISION, *et al.* IN OPPOSITION

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QUESTIONS PRESENTED

1. Whether the government can, consistently with the First Amendment and with this Court's decisions in *FCC v. Pacifica Foundation*, 438 U.S. 726 (1978), and *Sable Communications of California, Inc. v. FCC*, 492 U.S. 115 (1989), completely ban material that is deemed indecent—but not obscene—from radio and television.

2. Whether the "Helms Amendment," Pub. L. No. 100-459, § 608, 102 Stat. 2228 (1988), is constitutional under the First Amendment.

PARTIES TO THE PROCEEDINGS

The respondents on this brief are Action For Children's Television; American Civil Liberties Union; Association of Independent Television Stations, Inc.; CBS, Inc.; Infinity Broadcasting Corporation; Capital Cities/ABC, Inc.; Motion Picture Association of America, Inc.; National Association of Broadcasters; National Broadcasting Company, Inc.; National Public Radio; People For The American Way; Post-Newsweek Stations, Inc.; Public Broadcasting Service; Radio-Television News Directors Association; The Reporters Committee for Freedom of the Press; and Society of Professional Journalists.

Pursuant to this Court's Rule 29.1, following are the parent companies, subsidiaries (except wholly-owned subsidiaries), and affiliates of these respondents that are corporations:

Respondent Capital Cities/ABC, Inc. is affiliated with In-Store Advertising, Inc. and with Cellular Communications, Inc. Berkshire Hathaway, Inc. owns a minority of the stock of Capital Cities/ABC, Inc.

Loew's Corporation owns a minority of the stock of respondent, CBS, Inc.

Respondent National Broadcasting Company, Inc. ("NBC") is a wholly-owned subsidiary of National Broadcasting Company Holding, Inc., which is a wholly-owned subsidiary of General Electric Company. A wholly-owned subsidiary of NBC, NBC Cable Holding, Inc., owns a number of wholly-owned subsidiaries each of which has an interest in a number of cable-related companies, with the remaining interest in such companies being owned by unrelated companies. A wholly-owned subsidiary of NBC, NBC News Overseas, Inc., has a 37.5% interest in Visnews, Limited, with the other 62.5% interest being held by Reuters Limited and British Broadcasting Corporation. NBC has an 81.25% interest in Mobile Image Limited, a U.K. Company.

Respondent Post-Newsweek Stations, Inc. is a wholly-owned subsidiary of the Washington Post Company. The Washington Post Company has the following affiliates: Bear Island Paper Co.; Bowater Mersey Paper Co. Ltd.; International Herald Tribune, S.A.; Los Angeles Times/Washington Post News Service; Bear Island Timberlands Co.; Cowles Media Co.; Tayside Cable Systems Limited; Kingdom Cablevision Limited; and American PSC L.P.

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---

BRIEF FOR THE RESPONDENTS ACTION FOR CHILDREN'S TELEVISION, *et al.* IN OPPOSITION

STATEMENT

At issue in this case in an order of the Federal Communications Commission ("Commission" or "FCC") imposing a complete ban on broadcast material that the FCC considers to be indecent, but not obscene. This blanket ban, which reversed long-standing Commission policy, was mandated by a federal statute known as the

"Helms Amendment."[1] Included within the definition of indecency is material that may be considered offensive or sexually suggestive but is clearly not obscene because it does not appeal to the prurient interest and because it has serious literary, artistic, political, or scientific merit. The background of that statute and the earlier proceedings are summarized below.[2]

From time to time in the past the Commission has sought to restrict the broadcast of "indecent" material under 18 U.S.C. § 1464 (1988).[3] Beginning in the 1970's, the Commission began to focus its attention on programs

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[1] Making Appropriations for the Departments of Commerce, Justice, and State, the Judiciary and Related Agencies for the Fiscal Year Ending September 30, 1989 and for Other Purposes, Pub. L. No. 100-459, § 608, 102 Stat. 2228 (1988).

[2] All citations to "Pet. App." refer to the Appendix to the Petition filed by the government in No. 91-952. A copy of the two-volume Joint Appendix that was filed with the court of appeals has been lodged with the Clerk of this Court. Citations to that joint appendix are designated "J.A."

[3] That statute subjects persons who "utter[] any obscene, indecent, or profane language by means of radio communication" to a fine of not more than $10,000 or imprisonment for up to two years, or both.

Pursuant to this statute, the Commission, in the 1930's, investigated a radio station that had broadcast an NBC Blue Network presentation of Eugene O'Neill's 1920 Pulitzer Prize-winning play "Beyond The Horizon." *See* H.P. Warner, *Radio and Television Law* § 34a, at 339 (1948). Subsequently, the Commission investigated both CBS and the NBC Blue Network for transmitting suggestive Spanish songs during the Spanish Civil War. *Id.* at 337. In the 1960's, the Commission refused to renew a radio station license belonging to the late Edward G. Robinson, Jr., finding that the station had broadcast programs that contained sexual innuendo and were "coarse, vulgar, suggestive, and susceptible of indecent, double meaning," even though they were not obscene. *Robinson v. FCC*, 334 F.2d 534, 535 (D.C. Cir.) (per curiam) (affirming on alternative ground to avoid constitutional question as to program censorship), *cert. denied*, 379 U.S. 843 (1964).

involving repeated use of what have become known as the "seven dirty words." In 1978, in *FCC v. Pacifica Foundation*, 438 U.S. 726 (1978), this Court narrowly affirmed the Commission's ruling that George Carlin's "Filthy Words" monologue was indecent, and that a radio broadcast of that monologue at 2 p.m. on a Tuesday afternoon violated 18 U.S.C. § 1464. A sharply divided Court "emphasize[d] the narrowness of [its] holding." 438 U.S. at 750. Thereafter, the FCC permitted broadcasters to channel broadcasts that included so-called indecent material to a safe harbor period after 10 p.m.,[4] and for the next decade indecency regulation was limited to material involving repetitive use of the so-called "seven dirty words"—the situation involved in *Pacifica* itself.[5]

In 1987, the Commission *sua sponte* released a Public Notice, abruptly altering its regulatory course. *See New Indecency Enforcement Standards To Be Applied To All Broadcast and Amateur Radio Licensees*, 62 Rad. Reg. 2d (P&F) 1218 (1987) ("Public Notice"). In this Public Notice, the Commission substantially expanded its regulation of indecency, stating that it would no longer limit its indecency enforcement to the type of material at issue in *Pacifica*. Instead, it stated that it would consider to be "indecent" and subject to regulation any "language or material that depicts or describes, in terms patently offensive as measured by contemporary community standards for the broadcast medium, sexual or excretory activities or organs." *Id.* at 1219.

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[4] *See New Indecency Enforcement Standards To Be Applied to All Broadcast and Amateur Radio Licensees*, Public Notice 87-153, 62 Rad. Reg. 2d (P&F) 1218, 1219-20 (1987) (describing prior policy).

[5] *See In re Pacifica Foundation*, 95 F.C.C. 2d 750 (1983) (finding morning announcer's use of several of "seven dirty words" not to be indecent); *WGBH Educational Foundation*, 69 F.C.C. 2d 1250, 1251 (1978) (finding television broadcasts dealing with "scatology, immodesty, vulgarity, nudity, profanity, and sacrilege" not to be indecent). *See also Decency in Broadcasting, Inc.*, 94 F.C.C. 2d 1162 (1983).

The Public Notice and subsequent cases suggested that enforcement under this standard would encompass a range of material, including news,[6] informational programs,[7] political advertising,[8] presentations of serious drama,[9] motion pictures,[10] dramatizations of serious works of literature,[11] satirical material,[12] and recordings by popular musicians.[13] Although the Commission noted that "consideration of context is critical in *all* indecency cases," it refused to "single [serious merit] out for greater weight or attention" in the determination of whether material is indecent, or to exempt news and public affairs

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[6] KSD-FM, Notice of Apparent Liability (October 29, 1990), J.A. 737; *In re Infinity Broadcasting Corp. of Pennsylvania*, 3 F.C.C. Rcd. 930, 937 n.31 (1987), *vacated in part and remanded sub nom. Action for Children's Television v. FCC*, 852 F.2d 1332 (D.C. Cir. 1988).

[7] *See, e.g.*, Letter to Mr. and Mrs. Roland Orle from Chief, Mass Media Bureau (Apr. 7, 1988), J.A. 784.

[8] *See, e.g.*, Letter to Hon. John E. Bourne, Jr. from Chief, Mass Media Bureau (Apr. 7, 1988), J.A. 729.

[9] *See, e.g., In re Pacifica Foundation, Inc.*, 2 F.C.C. Rcd. 2698, *reconsideration and clarification granted in part, denied in part sub nom. Infinity Broadcasting Corp. of Pennsylvania*, 3 F.C.C. Rcd. 930 (1987).

[10] *See, e.g., Kansas City Television, Ltd.*, Order, FCC 88-274, 4 F.C.C. Rcd. 7653 (Aug. 5, 1988).

[11] *See, e.g.*, Letter to Thomas Byrne from Chief, Mass Media Bureau (Apr. 7, 1988), J.A. 781.

[12] *See, e.g., In re Infinity Broadcasting Corp. of Pennsylvania*, 2 F.C.C. Rcd. 2705, *reconsideration and clarification granted in part and denied in part*, 3 F.C.C. Rcd. 930 (1987).

[13] *See, e.g.*, KLUC-FM, Notice of Apparent Liability (Oct. 26, 1989), J.A. 734. The Commission did not in each of these cases (nn. 6-13) find the particular material to be indecent, but it did make clear that these types of programs are not exempt from its indecency regulation.

programming from the broad reach of the new standard.[14] In addition, the Commission in its Public Notice stated that the ban would apply to any time of day when there was a "reasonable risk" of "children" (defined by the Commission to include children and teenagers up to the age of 17) in the audience. Public Notice at 1219.[15]

Multiple petitions for reconsideration were filed on two grounds relevant here. First, the petitions urged that the Commission's indecency standard was unconstitutionally vague. *See* Reconsideration Order, Pet. App. 46a. Second, because some children and teenagers might always be in the overall audience, the petitions urged that the Commission's approach had effectively banned at all hours broadcasts that the Commission considered to be indecent, and that the Commission was obligated to adopt a safe harbor when adults could have the opportunity to see and hear such materials. *Id.*

In its December 29, 1987, Order on Reconsideration, the Commission rejected the vagueness challenge, but agreed that it was constitutionally prohibited from imposing a blanket ban and that it was obligated to create a safe harbor. *See* Reconsideration Order, Pet. App. 39a.[16] It stated that 12:00 midnight was its "current

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[14] *In re Infinity Broadcasting Corp.*, 3 F.C.C. Rcd. 930, 932, 937 & n.28 (1987) (emphasis in original).

[15] On the same day it issued the Public Notice, the Commission released three decisions, each of which declared "indecent" material that would not have been so identified under the Commission's earlier standard; two of the three broadcasts at issue in the decisions occurred after 10 p.m. No sanctions were issued in these matters because of the acknowledged change in Commission policy. *In re Infinity Broadcasting Corp. of Pennsylvania*, 2 F.C.C. Rcd. 2705 (1987); *In re Pacifica Foundation, Inc.*, 2 F.C.C. Rcd. 2698 (1987); *In re Regents of the University of California*, 2 F.C.C. Rcd. 2703 (1987).

[16] Some petitions, including one filed by Morality in Media, had urged that the Commission explicitly impose a blanket ban. The

thinking" as to when the risk of children and teenagers in the broadcast audience could reasonably be thought minimized, explaining that it "is late enough . . . to rely on parents to exercise increased supervision over whatever children remain in the viewing and listening audience." *Id.* at 62a-63a n.47. The Commission made clear that the safe harbor was designed to "advanc[e] the government interest in safeguarding children from [indecent material] so as to enable parents to decide effectively what material of this kind their children will see or hear." *Id.* at 48a. The Commission further stated that, to be "consistent with . . . constitutional principles," it could not "preclude access by adults [to indecent materials]." *Id.* at 49a-50a.

On review, the District of Columbia Circuit (Judges Robinson, R.B. Ginsburg, and Sentelle) affirmed in part and reversed in part. *Action for Children's Television v. FCC*, 852 F.2d 1332 (D.C. Cir. 1988) (*ACT I*) (Pet. App. 13a-38a). The court of appeals conceded that "vagueness is inherent" in the Commission's definition of indecency (Pet. App. 38a), but held that it was precluded from ruling that the standard is unconstitutionally vague under this Court's decision in *FCC v. Pacifica Foundation*, 438 U.S. 726 (1978).

However, the court of appeals agreed with respondents that it was necessary for the FCC to adopt "a reasonable safe harbor rule" to permit "the precision necessary to allow scope for the first amendment shielded freedom and choice of broadcasters and their audiences." Pet. App. 35a-36a n.18. Citing the statements of the FCC's General Counsel at oral argument, the court reasoned that "the government's role is to facilitate parental supervision of children's listening," and "[t]hus, the FCC must endeavor to determine what channeling rule will

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FCC rejected this request on the ground that it would "run afoul of [the] constitutional premise. . . ." Reconsideration Order, 3 F.C.C. Rcd. at 931, Pet. App. 50a.

most effectively promote parental—as distinguished from government—control." *Id.* at 37a. The court agreed that the Commission's new safe harbor period of midnight to 6 a.m. was both arbitrary and too limited. The court concluded that the Commission's findings in this respect were "more ritual than real" and the underlying evidence on which it relied "insubstantial." *Id.* at 32a. The court therefore remanded the case to the Commission, directing it to conduct a "full and fair hearing" on the safe harbor hours.[17] *Id.* at 38a.

Before the Commission had an opportunity to conduct the hearing, Congress adopted a rider to appropriations legislation, known as "the Helms Amendment," which required the FCC to promulgate regulations imposing a 24-hour-a-day ban on indecent speech.[18] Thereafter, the Commission declined to comply with the notice and comment required by the District of Columbia Circuit's remand order, stating that to do so would be futile because its "task in promulgating the rule is purely ministerial and leaves no room for discretion." Pet. App. 78a. Accordingly, the Commission adopted a new rule banning all broadcasts of any material deemed to be indecent, no matter the time of day. *Id.* at 77a.

Respondents sought a stay on the ground that the new statute and revised policy were unconstitutional, and a panel of the District of Columbia Circuit (Judges Mikva, R.B. Ginsburg, and Silberman) unanimously stayed the

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[17] The court also directed the Commission to address the inclusion of teens aged 12-17 in the definition of children and what constitutes a "reasonable risk" that children may be exposed to indecent materials.

[18] The Helms Amendment provided that:

> By January 31, 1989, the Federal Communications Commission shall promulgate regulations in accordance with section 1464, title 18, United States Code, to enforce the provisions of such section on a 24 hour per day basis.

Pub. L. No. 100-459, § 608, 102 Stat. 2228 (1988).

order. *Action for Children's Television v. FCC*, No. 88-1916, Order (D.C. Cir. Jan. 23, 1989), J.A. 3. While the stay was in effect pending review, this Court held that a blanket ban on indecent telephone message services violated the First Amendment. *Sable Communications of California, Inc. v. FCC*, 492 U.S. 115 (1989). There, this Court found "quite unpersuasive" the government's argument that a blanket ban was necessary because "nothing less could prevent children from gaining access to such messages." *Id.* at 128. The Court concluded that a blanket ban could not be justified even if "a few of the most enterprising and disobedient young people would manage to secure access to such messages." *Id.* at 130.

The FCC thereafter sought a remand of the record in the present case to allow it to "collect data relevant to a judicial determination of the validity of a total ban on broadcast indecency." Motion for Remand (filed Aug. 24, 1989). The District of Columbia Circuit granted the motion "in light of the Supreme Court's recent decision in *Sable Communications of California v. FCC*," and directed the FCC to "conduct a full and fair hearing on the issue of the propriety of indecent broadcasting." *Action for Children's Television v. FCC*, No. 88-1916, Order (D.C. Cir. Sept. 13, 1989), J.A. 4.

Rather than hold such a hearing, the FCC announced that it would instead "compile a record in support of Congress' imposition of a 24-hour ban on the broadcast of indecent material." *See* Enforcement of Prohibitions Against Broadcast Indecency in 18 U.S.C. § 1464, MM Docket 89-494, Notice of Inquiry, FCC 89-307 (Nov. 20, 1989), J.A. 12. The comments received by the FCC demonstrated that the Commission's indecency regulation reaches a broad range of valuable, protected speech which to a great extent is unavailable elsewhere.[19] The

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[19] *See, e.g.*, pp. 4-5 *supra*; p. 16 n.32 *infra*; Comments of the Pacifica Foundation, *et al.* (filed Feb. 20, 1990), J.A. 321-324; Com-

majority of formal comments filed with the Commission also opposed a blanket ban on broadcast indecency, on the grounds that a ban impermissibly interferes with broadcasters' programming decisions and denies adults access to broadcasts that may contain such material, thereby reducing adults to seeing and hearing only what is fit for children.[20] In addition, these comments pointed to the absence of any showing of harm to children and presented uncontroverted evidence that parents or other adults are in fact present with virtually all children for large periods of the day, including the evening hours that the FCC itself had previously sanctioned as a safe harbor, making channeling a less restrictive means of furthering the government's interest in assisting parents to supervise their children.[21] Even comments favoring government regulation of indecent speech questioned the constitutionality of a blanket ban.[22]

The Commission also received comments in support of the blanket ban, which claimed that the government has a compelling interest in shielding both children and adults from indecency,[23] that children have broad access to televisions and radios,[24] and that it is impractical for "already harried parents" to supervise their children's

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ments of P.E.N. American Center, *et al.* (filed Feb. 20, 1990), J.A. 388-392; Comments of Cohn and Marks at 16-20 (filed Feb. 21, 1990).

[20] *See, e.g.*, Comments of Action for Children's Television, *et al.* ("ACT") (filed Feb. 20, 1990), J.A. 105-113, 136-141.

[21] *See* Comments of ACT, J.A. 114-119.

[22] *See* Comments of the U.S. Catholic Conference (filed Feb. 20, 1990), J.A. 401.

[23] *See* Reply Comments of Morality in Media, Inc. (filed Jan. 18, 1990), J.A. 459-474.

[24] *See* Comments of American Family Association, Inc., *et al.* at 15-18 (filed Feb. 21, 1990).

listening and viewing.[25] These commenters presented no evidence contradicting respondents' showing that parents or other adults were with their children for large portions of the day, and thus able to exercise control over their children's viewing and listening if they wished to do so.

On August 6, 1990, the Commission issued its Report in support of its prior conclusion that a complete ban on broadcast indecency was justified. Pet. App. 82a-151a. The Report claimed that the government has an independent interest in shielding children and teenagers from broadcast material the Commission considers indecent, regardless of whether parents have the opportunity to supervise their children. *Id.* at 94a-96a & n.22; 121a-122a. The Report also asserted that a complete ban on broadcast indecency "is the most narrowly tailored means of protecting children from indecent material" (*id.* at 147a), because "at all times there is a reasonable risk that significant numbers of children are in the broadcast audience" who are without "effective" or "meaningful parental supervision." *Id.* at 132a-134a. The Report did not take issue with respondents' showing as to the opportunities for adult supervision. To the Commission, "parents can effectively supervise their children only by co-viewing or co-listening, or, at a minimum, by remaining actively aware of what their children are watching at all times." *Id.* at 126a.

As an apparent afterthought, the Report claimed that while the Commission had focused on protecting children, "preserving the privacy of the home provides an alternative basis for upholding the constitutionality of the 24-hour prohibition." *Id.* at 100a. The Report referred to this basis in passing in just six of its 96 paragraphs (*id.* at 93a, 94a, 100a, 102a, 109a, 144a), and did not rely on it in concluding that a blanket ban was appropriate. *Id.* at 147a.

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[25] *Id.* at 42.

On review, the District of Columbia Circuit (Chief Judge Mikva, Judge Edwards and then-Judge Thomas) held that the blanket ban could not withstand constitutional scrutiny. The court restated the standards previously set forth in *ACT I*: indecent—but not obscene—broadcast material is protected by the First Amendment; any restrictions on such material must serve a compelling state interest and must be precisely drawn; and the government's compelling interest in "safeguarding the physical and psychological well-being of a minor . . . may be served only by a carefully-tailored regulation." Pet. App. 9a. To the court, nothing in the nearly three years since *ACT I* was decided had altered its "precedential force." Pet. App. 10a. Accordingly, the court of appeals again held that it was constitutionally necessary for the FCC to adopt some period of the day to serve as a safe harbor.[26]

The court of appeals remanded the case to the FCC for a full and fair hearing that would address a less-than-wholesale ban on broadcast indecency. The government and Children's Legal Foundation and American Family Association, Inc. sought rehearing, which was denied.[27] Pet. App. 192a. Their Suggestions for Rehearing *En*

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[26] In response to the challenge to the Commission's definition of indecency, the court of appeals stated that it was precluded by *ACT I* from finding the definition to be unconstitutionally vague. Pet. App. 7a. The court in *ACT I* had believed itself constrained from finding that definition of indecency to be unconstitutionally vague based on this Court's holding in *Pacifica*. *Id.* at 26a. *See supra* at p. 6.

The court also directed the Commission to review carefully and address "the appropriate definitions of 'children' and 'reasonable risk' for channeling purposes, the paucity of station- or program-specific audience data expressed as a percentage of the relevant age group population, and the scope of the government's interest in regulating indecent broadcasts." Pet. App. 12a.

[27] Petitioners Children's Legal Foundation and American Family Association, Inc. will be referred to as "CLF" and their petition cited as "CLF Pet."

Banc were also denied, and no member of the District of Columbia Circuit requested that a vote on the Suggestions be taken. Pet. App. 193a. The Commission did not hold a hearing. The petitions for certiorari followed.

REASONS FOR DENYING THE WRIT

Petitioners have shown no basis for granting certiorari in this case. The conclusion reflected in the decision below—that a blanket ban on broadcast indecency is unconstitutional—was endorsed by three separate panels of the court of appeals, consisting of seven individual judges.[28] There was not a single dissent, and no judge of the court of appeals voted for rehearing en banc when the government urged the same arguments that it now presents to this Court. Pet. App. 192a-193a. Petitioners do not allege a conflict among the circuits, and, because the court of appeals remanded the matter to the FCC for further factfinding, the case lacks finality. Most significant, the decision below, far from departing from this Court's decisions, faithfully implements them, including particularly this Court's decisions in *Sable Communications of California, Inc. v. FCC*, 492 U.S. 115 (1989), and *FCC v. Pacifica Foundation*, 438 U.S. 726 (1978). Certiorari should be denied.

1. The government concedes that indecent—but not obscene—speech is protected by the First Amendment.[29]

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[28] The stay panel evidently agreed with the two merits panels that the regulation and the statute on which it is based were unconstitutional. *See Action for Children's Television v. FCC*, No. 88-1916, Order (D.C. Cir. Jan. 23, 1989), J.A. 3.

[29] In fact, in a separate indecency case involving telephone message services, the government, in successfully opposing a petition for certiorari, acknowledged that due to its protected status indecent speech may be regulated only if there is a compelling state interest. Brief for United States in Opposition at 8, *Dial Information Services Corp. v. Barr*, No. 91-697 (cert. denied Jan. 27, 1992) ("Dial Br."). The government there claimed only that "protecting the physical and psychological well-being of minors" is such an inter-

This well-established principle was recently reaffirmed in *Sable Communications of California, Inc. v. FCC*, 492 U.S. 115 (1989), where this Court specifically held that "sexual expression which is indecent but not obscene is protected by the First Amendment." *Id.* at 126. Despite this central concession, the government, along with petitioners Children's Legal Foundation and American Family Association, Inc., claim a grant of certiorari is warranted because the court of appeals did not give proper weight to the governmental "interest in protecting the adult listener from intrusion in . . . the privacy of the home." Gov't Pet. 13. *See also* CLF Pet. 24-26.

The petition for certiorari represents a complete reversal of the Commission's prior position on this issue. Less than five years ago, the Commission refused to impose a blanket ban on the broadcast of indecent material. To the Commission, a complete prohibition would "run afoul of [the] constitutional premise" that the Commission "may only do that which is necessary to restrict children's access to indecent broadcasts" and "may not go further so as to preclude access by adults who are interested in seeing or hearing such material." Reconsideration Order, Pet. App. 49a-50a (quoted in *ACT II*, Pet. App. 11a).

The government has established no basis for granting certiorari to consider whether it may impose a blanket

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est, *id.*, and did not assert any sort of interest in "protecting" adults.

Neither *Pacifica* nor any other decision of this Court supports the suggestion of CLF (CLF Pet. 10-12) that indecent speech can be entirely excluded from the airwaves as a nuisance unprotected by the First Amendment. Indeed, the opinions in *Pacifica* said just the opposite. *See, e.g., Pacifica*, 438 U.S. at 750 (plurality opinion) (decision to regulate the Carlin monologue was based on "context," including the time of day at which it was broadcast); *id.* at 763 (Brennan, J., dissenting) (observing that "all members of the Court agree that the Carlin monologue aired by station WBAI does not fall within one of the categories of speech, such as 'fighting words,' . . . or obscenity, . . . that is totally without First Amendment protection") (citations omitted).

ban on so-called "indecent broadcasts" in order to protect adults from such material. In this respect, the decision below is not alleged to conflict with any decisions of the other courts of appeals. Indeed, every court that has considered the question has unhesitatingly agreed that blanket bans on speech, whether involving print, cable, telephone, or broadcast, violate the First Amendment.[30] Nor is there any conflict with this Court's precedents. This Court has firmly established that the government cannot "reduce the adult population" to seeing or hearing "only what is fit for children." *Butler v. Michigan*, 352 U.S. 380, 383 (1957).

This continues to be the controlling principle. In *Bolger v. Youngs Drug Products Corp.*, 463 U.S. 60 (1983), the Court rejected the government's argument that a blanket ban on unsolicited mailings of contraceptive advertisements was constitutional because it was designed to protect the privacy of the home. While individuals may wish to restrict what enters their home, the Court stated, "we have never held that the Government itself can shut off the flow of mailings to protect those recipients who might potentially be offended." *Id.* at 72.

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[30] *See, e.g., Sable*, 492 U.S. at 127 (telephone); *Wilkinson v. Jones*, 480 U.S. 926 (1987) (mem.), *aff'g*, 800 F.2d 989 (10th Cir. 1986) (per curiam), *aff'g sub nom. Community Television of Utah, Inc. v. Wilkinson*, 611 F. Supp. 1099 (D. Utah 1985) (cable); *Bolger v. Youngs Drug Prods. Corp.*, 463 U.S. 60 (1983) (mail); *Butler v. Michigan*, 352 U.S. 380 (1957) (print); *ACT I*, 852 F.2d at 1343 n.18 (broadcasting); *Carlin Communications, Inc. v. FCC*, 837 F.2d 546 (2d Cir.), *cert. denied*, 488 U.S. 924 (1988) (telephone); *Cruz v. Ferre*, 755 F.2d 1415 (11th Cir. 1985) (cable); *American Booksellers Ass'n v. Webb*, 643 F. Supp. 1546 (N.D. Ga. 1986), *rev'd on other grounds*, 919 F.2d 1493 (11th Cir. 1991) (print); *Rushia v. Town of Ashburnham*, 582 F. Supp. 900 (D. Mass. 1983) (print); *Community Television of Utah, Inc. v. Roy City*, 555 F. Supp. 1164 (D. Utah 1982) (cable); *American Booksellers Ass'n v. McAuliffe*, 533 F. Supp. 50 (N.D. Ga. 1981) (print); *Home Box Office, Inc. v. Wilkinson*, 531 F. Supp. 987 (D. Utah 1982) (cable); *Tattered Cover, Inc. v. Tooley*, 696 P.2d 780 (Colo. 1985) (en banc) (print).

This rule is equally applicable to broadcasting. In upholding a Commission order premised on the presence of children in the listening audience, the Court in *Pacifica* rejected the notion that an interest in protecting adults from indecency would justify a blanket ban in the broadcast medium. The Court made clear that the restrictions at issue there did "not by any means reduce adults to hearing only what is fit for children." 438 U.S. at 750 n.28 (citing *Butler v. Michigan*, 352 U.S. at 383). Justice Powell re-emphasized this point in his decisive concurrence, stating that the Commission does not have "an unrestricted license to decide what speech, protected in other media, may be banned from the airwaves in order to protect unwilling adults from momentary exposure to it in their homes." 438 U.S. at 759-60.[31]

The Court recently reaffirmed this principle. In *Sable Communications*, the Court held unconstitutional a blanket ban on indecent speech involving telephone message services. Unlike the channeling in *Pacifica*, the Court stated, the ban in *Sable* was a "denial of adult access" and therefore unconstitutional, because it restricted adults to seeing and listening to "only what is fit for children". 492 U.S. at 128, 131 (internal quotations omitted). In acknowledging that broadcasting's " 'unique' attributes" may warrant limited restrictions on indecent speech that would be impermissible for other media, *Sable*, 492 U.S. at 127-128, the Court made no suggestion that a blanket ban in broadcasting would be constitutionally acceptable. To the contrary, the Court reemphasized the "narrowness" of its

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[31] While *Pacifica* itself made clear that a blanket ban designed to protect adult listeners would be unconstitutional, later decisions of this Court emphasize that an adult privacy interest would not even support channeling regulations. In *Bolger v. Youngs Drug Products, Corp.*, the Court expressly rejected protection of adults as a sufficient governmental interest, stating that such an interest "carries little weight." 463 U.S. at 71. Continuing, the Court emphasized that it was "the government's interest in protecting the young" that justified the restriction at issue in *Pacifica*. *Id.* at 74.

holding in *Pacifica*, which permitted only channeling—but not an absolute prohibition—of indecency in broadcasting.[32] There is therefore no basis for the assertion that "protecting" adults justifies a total ban on speech that falls within the First Amendment.[33]

2. The government and CLF also claim that this Court should grant certiorari to determine whether, on the facts of this case, anything other than a blanket ban on inde-

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[32] The availability of some indecent materials in other media (Gov't Pet. 19-20) has no bearing on the permissibility of the blanket ban. *See, e.g., Bolger*, 463 U.S. at 69-70 n.18; *Virginia State Bd. of Pharmacy v. Virginia Citizens Consumer Council, Inc.*, 425 U.S. 748, 757 n.15 (1976); *Spence v. Washington*, 418 U.S. 405, 411 n.4 (1974) (per curiam); *Schneider v. State*, 308 U.S. 147, 163 (1939). Moreover, contrary to the assertions of petitioners (Gov't Pet. 19-20; CLF Pet. 28), large quantities of broadcast material—such as live radio or television talk shows, coverage of breaking news stories, live broadcasts, special news reports, public affairs programs, and many made-for-television entertainment programs—simply are not available elsewhere. Of the broadcast programs that were the subjects of sixteen Notices of Apparent Liability and Letters of Inquiry issued in 1989 and 1990 on indecency grounds, at least eleven contained material that was unavailable in any other medium. *See, e.g.*, WFBQ-FM, Notice of Apparent Liability (Oct. 29, 1990), J.A. 743; KSJO, Notice of Apparent Liability (June 26, 1990), J.A. 740; WMMQ-FM, Letter of Inquiry (June 14, 1990) J.A. 757; WVIC-FM, Letter of Inquiry (June 1, 1990), J.A. 761.

[33] Nor does the Court's decision in *Barnes v. Glen Theatre, Inc.*, 111 S.Ct. 2456 (1991), provide support for a blanket ban. There, the state sought to ban nude dancing under a statute prohibiting public nudity. Unlike the blanket ban on protected speech here, the statute in *Barnes* addressed conduct, and had only an incidental effect on constitutionally-protected expression. *See* 111 S.Ct. at 2461 (plurality opinion); *id.* at 2463 (Scalia, J. concurring); *id.* at 2468 (Souter, J. concurring). Moreover, the decisive vote of Justice Souter in *Barnes* turned on the adverse secondary effects of nude barroom dancing, *id.* at 2468-2469; there are no secondary effects that are claimed to support the blanket ban at issue here.

The government's reliance on *Frisby v. Schultz*, 487 U.S. 474 (1988), is similarly misplaced. The prohibition on residential picketing at issue there was a content-neutral time, place, and manner regulation. Here, in contrast, the ban is content-specific. *See Boos v. Barry*, 485 U.S. 312, 319-321 (1988).

cent broadcasts would enable parents to supervise children. Gov't Pet. 10; CLF Pet. 28. Certiorari is not appropriate simply to determine whether the court below reached the correct result on the facts of this case.[34]

In any event, that result was clearly correct. The government's sole legitimate interest in regulating indecent speech is to provide parents the opportunity to supervise their children's listening and viewing, not to supersede parental authority. "[C]onstitutional interpretation has consistently recognized that the parents' claims to authority in their own household to direct the rearing of their children is basic in the structure of our society." *Ginsberg v. New York*, 390 U.S. 629, 639 (1968) (quoted with approval in *Pacifica*, 438 U.S. at 749-50). Judge Leventhal's dissenting opinion in *Pacifica* in the court of appeals concluded that the Commission could "assist parents in their protection of young children," and noted that the channeling of indecent speech "reflects . . . a determination concerning a broad consensus of society, . . . the further view that in our society, with the family as its base block, it is the family that should have the means to make that choice." *Pacifica Foundation v. FCC*, 556 F.2d 9, 33, 37 (D.C. Cir. 1977) (Leventhal, J. dissenting) (cited with approval in *Pacifica*, 438 U.S. at 757 & n.1 (Opinion of Powell, J.)). The courts have repeatedly stressed this interest as the key in determining the permissible scope of regulation.[35]

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[34] The government recently successfully opposed a grant of certiorari in another case that raised the question of whether the court below had correctly applied accepted standards to the facts of a particular case, in the context of the most recent Helms Amendment regulating dial-it services. *See* Dial Br. at 8-9, *supra* note 29.

[35] *See, e.g., Cruz v. Ferre*, 755 F.2d 1415, 1420 (11th Cir. 1985) (parental decisionmaking in cable); *Fabulous Associates, Inc. v. Pennsylvania Public Utility Commission*, 896 F.2d 780, 788 (3d Cir. 1990) (parental decisionmaking in dial-it services). Even *Ginsberg v. New York*, which involved speech that was obscene, not indecent, as to children, emphasized that laws prohibiting distribution to minors, while they "aid discharge" of parents' "primary responsi-

The uncontradicted record below establishes that parents (or other adults) are with their children for much of the broadcast day, and are available to supervise their children's viewing and listening. For example, between the hours of 10 p.m. and 6 a.m., the safe harbor period used by the Commission during the decade following *Pacifica*, 99% of all persons aged 17 and younger are under adult supervision; more than 93% are under parental supervision.[36] Similarly, in the midnight to 6 a.m. period, the safe harbor period adopted by the Commission in its December 29, 1987, decision and held to be inadequate by the court of appeals in *ACT I*, more than 98% of persons aged 17 years and younger are under parental supervision.[37]

It is thus beside the point that "minors are present in the audiences for radio and television broadcasts at all times of the day and night." Gov't Pet. 16. *See also* CLF Pet. 28. The record before the court of appeals unequivocally establishes that, because parents have the opportunity to control their children's viewing and listening during most of the day, including the evening hours, the government's interest in "promoting parental supervision of children's listening" can be served without imposing a blanket ban on protected speech. *ACT I*, Pet. App. 37a-38a. That parents may choose not to supervise their children's viewing and listening is not relevant; the governmental interest is precisely in providing parents this choice.

3. Review on this record also would not be appropriate because the judgment below lacks finality. *See, e.g.*,

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bility for children's well being," do "not bar parents who so desire from purchasing the magazines for their children." 390 U.S. at 639.

[36] *See* National Research, Inc., When Children Are In The Presence Of Parents And Other Adults: A Survey of Parents (1990) J.A. 238-239.

[37] *Id.*

Brotherhood of Locomotive Firemen & Enginemen v. Bangor & Aroostook R.R., 389 U.S. 327, 328 (1967) (per curiam) ("because the Court of Appeals remanded the case, it is not yet ripe for review by this Court"); *Hamilton-Brown Shoe Co. v. Wolf Brothers & Co.*, 240 U.S. 251, 258 (1916) (fact that decree was not final "alone furnished sufficient ground for the denial" of certiorari). The court of appeals remanded this case to the Commission for a hearing to determine the proper hours of a safe harbor period. That hearing has not been held.

If review of the blanket ban were appropriate at all, it would best be considered in the context of a fully-developed Commission record. In its absence, the Court would be unable to evaluate available alternatives to a complete ban on protected speech and the effectiveness of such alternative measures in serving the valid governmental interest.[38]

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[38] A grant of certiorari would also be undesirable because of the likelihood that Justice Thomas would be unavailable to review this case due to his participation when it was heard in the court of appeals. *Cf.* 28 U.S.C. § 47 (1988) ("No judge shall hear or determine an appeal from the decision of a case or issue tried by him"). His absence would create the possibility of a divided Court, which counsels against a grant of certiorari. As then-Justice Rehnquist recognized, "[w]hile it can seldom be predicted with confidence at the time that a Justice addresses himself to the issue of disqualification whether or not the Court in a particular case will be closely divided, the disqualification of one Justice of this Court raises the possibility of an affirmance of the judgment below by an equally divided Court." *Laird v. Tatum*, 409 U.S. 824, 837-838 (1972) (Rehnquist, J.) (memorandum decision).

CONCLUSION

The petition for a writ of certiorari should be denied.

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January 31, 1992